

EXHIBIT 28

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JAMES HAYDEN,

Plaintiff,

v.

2K GAMES, INC., et al.,

Defendants.

CASE NO. 1:17-cv-02635-CAB

JUDGE CHRISTOPHER A. BOYKO

**PLAINTIFF’S OBJECTIONS AND RESPONSES TO DEFENDANTS 2K GAMES, INC.
AND TAKE-TWO INTERACTIVE SOFTWARE, INC.’S FIRST SET OF REQUESTS
FOR ADMISSION**

Under the Federal Rules of Civil Procedure 36 and the Local Civil Rules for the United States District Court for the Northern District of Ohio, Plaintiff James Hayden (“Hayden”) objects and responds to Defendants’ (2K Games, Inc. and Take-Two Interactive Software, Inc.) (collectively (“Take-Two”)) First Set of Requests for Admission (Nos. 1–241) as follows:

GENERAL STATEMENT

Hayden’s responses are made without in any way waiving or intending to waive but, on the contrary, intending to preserve and expressly preserving:

- (1) the right to raise all questions or relevancy, materiality, privilege, and admissibility into evidence to any interrogatory or the answer thereto;
- (2) the right to object on any grounds at any time to other requests or other discovery involving the information provided; and

and 2K19 (TAKE-TWO_0001148) produced by Defendants during discovery in this case show real world NBA players moving while the games are being played by a user.

REQUEST FOR ADMISSION NO. 20:

Admit that, while a user plays simulated basketball games in the NBA 2K GAMES, commenters narrate what his or her players are doing.

RESPONSE:

Plaintiff objects to this request as being vague and ambiguous as the phrase “simulated basketball games” is not defined and its meaning is not clear from the context. Plaintiff objects to this request as being overly broad in that it is not proportional to the needs of the case as Defendants are in a better position to understand how each and every version of the accused NBA 2K GAMES operate. Given the number of games at issue, the different version of these games that are or have been available, Defendant’s limited production of a single representation version of each of NBA 2K16, 2K17, 2K18, and 2K19 on a single gaming platform, and Defendant’s failure to produce or otherwise give Plaintiff access to representative copies of NBA 2K20 and NBA 2K Mobile, it is unduly burdensome for Plaintiff to review every possible version of each of the NBA 2K GAMES. Plaintiff further objects to this request as overly broad, unduly burdensome, irrelevant and not proportional to the needs of this case as it is not limited in scope to either the NBA players at issue or tattoos at issue in this case.

Without waiving these objections or the General Objections set forth above and to the extent that Plaintiff understands this request, Plaintiff admits that when a user is playing basketball games, commentators may be speaking in X-box One versions of NBA 2K16 (TAKE-TWO_0001145), 2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19

(TAKE-TWO_0001148) produced by Defendants during discovery. Plaintiff denies that commentators are always speaking when a user is playing basketball games in X-box One versions of NBA 2K16 (TAKE-TWO_0001145), 2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001148) produced by Defendants during discovery, and, except as expressly admitted, denies this request

REQUEST FOR ADMISSION NO. 21:

Admit that the NBA 2K GAMES depict real world arenas.

RESPONSE:

Plaintiff objects to this request as being vague and ambiguous as the terms “depict” and “real world arenas” are not defined and their meaning is not clear from the context. Plaintiff further objects to this request as being overly broad in that it is not proportional to the needs of the case as Defendants are in a better position to understand how each and every version of the accused NBA 2K GAMES operate. Given the number of games at issue, the different version of these games that are or have been available, Defendant’s limited production of a single representation version of each of NBA 2K16, 2K17, 2K18, and 2K19 on a single gaming platform, and Defendant’s failure to produce or otherwise give Plaintiff access to representative copies of NBA 2K20 and NBA 2K Mobile, it is unduly burdensome for Plaintiff to review every possible version of each of the NBA 2K GAMES. Plaintiff further objects to this request as overly broad, unduly burdensome, irrelevant and not proportional to the needs of this case as it is not limited in scope to either the NBA players or tattoos at issue in this case.

Without waiving these objections or the General Objections set forth above and to the extent that Plaintiff understands this request, Plaintiff admits that there are graphical

representations of arenas in the X-box One versions of NBA 2K16 (TAKE-TWO_0001145), 2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001147) by Defendants during discovery in this case, and that these graphical representations of arenas have some features that appear to correspond to real world arenas. Except as expressly admitted, Plaintiff denies this request.

REQUEST FOR ADMISSION NO. 22:

Admit that the NBA 2K GAMES depict real world basketball courts.

RESPONSE:

Plaintiff objects to this request as being vague and ambiguous as the terms “depict” and “real world basketball courts” are not defined and their meaning is not clear from the context. Plaintiff further objects to this request as being overly broad in that it is not proportional to the needs of the case as Defendants are in a better position to understand how each and every version of the accused NBA 2K GAMES operate. Given the number of games at issue, the different version of these games that are or have been available, Defendant’s limited production of a single representation version of each of NBA 2K16, 2K17, 2K18, and 2K19 on a single gaming platform, and Defendant’s failure to produce or otherwise give Plaintiff access to representative copies of NBA 2K20 and NBA 2K Mobile, it is unduly burdensome for Plaintiff to review every possible version of each of the NBA 2K GAMES. Plaintiff further objects to this request as overly broad, unduly burdensome, irrelevant and not proportional to the needs of this case as it is not limited in scope to either the NBA players or tattoos at issue in this case.

Without waiving these objections or the General Objections set forth above and to the extent that Plaintiff understands this request, Plaintiff admits that there are graphical

representations of basketball courts in the X-box One versions of NBA 2K16 (TAKE-TWO_0001145), 2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001147) by Defendants during discovery in this case, and that these graphical representations of basketball courts have some features that appear to correspond to real world basketball courts. Except as expressly admitted, Plaintiff denies this request.

REQUEST FOR ADMISSION NO. 23:

Admit that the NBA 2K GAMES' gameplay depicts NBA cheerleaders.

RESPONSE:

Plaintiff objects to this request as being vague and ambiguous as the terms "depicts" and "gameplay" are not defined and their meaning is not clear from the context. Plaintiff further objects to this request as being overly broad in that it is not proportional to the needs of the case as Defendants are in a better position to understand how each and every version of the accused NBA 2K GAMES operate. Given the number of games at issue, the different version of these games that are or have been available, Defendant's limited production of a single representation version of each of NBA 2K16, 2K17, 2K18, and 2K19 on a single gaming platform, and Defendant's failure to produce or otherwise give Plaintiff access to representative copies of NBA 2K20 and NBA 2K Mobile, it is unduly burdensome for Plaintiff to review every possible version of each of the NBA 2K GAMES. Plaintiff further objects to this request as overly broad, unduly burdensome, irrelevant and not proportional to the needs of this case as it is not limited in scope to either the NBA players or tattoos at issue in this case.

Without waiving these objections or the General Objections set forth above and to the extent that Plaintiff understands this request, Plaintiff admits the X-box One versions of NBA

2K16 (TAKE-TWO_0001145), 2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001148) produced by Defendants during discovery in this case have avatars having some features that appear to correspond to NBA cheerleaders. Except as expressly admitted, Plaintiff denies this request.

REQUEST FOR ADMISSION NO. 24:

Admit that the NBA 2K GAMES depict audiences.

RESPONSE:

Plaintiff objects to this request as being vague and ambiguous as the term “depict” is not defined and its meaning is not clear from the context. Plaintiff further objects to this request as being overly broad in that it is not proportional to the needs of the case as Defendants are in a better position to understand how each and every version of the accused NBA 2K GAMES operate. Given the number of games at issue, the different version of these games that are or have been available, Defendant’s limited production of a single representation version of each of NBA 2K16, 2K17, 2K18, and 2K19 on a single gaming platform, and Defendant’s failure to produce or otherwise give Plaintiff access to representative copies of NBA 2K20 and NBA 2K Mobile, it is unduly burdensome for Plaintiff to review every possible version of each of the NBA 2K GAMES. Plaintiff further objects to this request as overly broad, unduly burdensome, irrelevant and not proportional to the needs of this case as it is not limited in scope to either the NBA players or tattoos at issue in this case.

Without waiving these objections or the General Objections set forth above and to the extent that Plaintiff understands this request, Plaintiff admits that there are graphical representations of audiences in the X-box One versions of NBA 2K16 (TAKE-TWO_0001145),

2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001147) by Defendants during discovery in this case. Except as expressly admitted, Plaintiff denies this request.

REQUEST FOR ADMISSION NO. 25:

Admit that the audio that plays during the NBA 2K GAMES' gameplay includes cheering crowds.

RESPONSE:

Plaintiff objects to this request as being vague and ambiguous as the phrases "gameplay" and "cheering crowds" are not defined and their meaning is not clear from the context. Plaintiff further objects to this request as being overly broad in that it is not proportional to the needs of the case as Defendants are in a better position to understand how each and every version of the accused NBA 2K GAMES operate. Given the number of games at issue, the different version of these games that are or have been available, Defendant's limited production of a single representation version of each of NBA 2K16, 2K17, 2K18, and 2K19 on a single gaming platform, and Defendant's failure to produce or otherwise give Plaintiff access to representative copies of NBA 2K20 and NBA 2K Mobile, it is unduly burdensome for Plaintiff to review every possible version of each of the NBA 2K GAMES. Plaintiff further objects to this request as overly broad, unduly burdensome, irrelevant and not proportional to the needs of this case as it is not limited in scope to either the NBA players or tattoos at issue in this case.

Without waiving these objections or the General Objections set forth above and to the extent that Plaintiff understands this request, Plaintiff admits that when a user is playing basketball games in X-box One versions of NBA 2K16 (TAKE-TWO_0001145), 2K17 (TAKE-

TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001148) produced by Defendants during discovery, that the audio that may play includes cheering crowds. Plaintiff denies that the audio that includes cheering crowds is always playing when a user is playing basketball games in X-box One versions of NBA 2K16 (TAKE-TWO_0001145), 2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001148) produced by Defendants during discovery, and, except as expressly admitted, denies this request.

REQUEST FOR ADMISSION NO. 26:

Admit that the audio that plays during the NBA 2K GAMES' gameplay includes buzzers.

RESPONSE:

Plaintiff objects to this request as being vague and ambiguous as the terms “gameplay” and “buzzers” are not defined and their meaning is not clear from the context. Plaintiff further objects to this request as being overly broad in that it is not proportional to the needs of the case as Defendants are in a better position to understand how each and every version of the accused NBA 2K GAMES operate. Given the number of games at issue, the different version of these games that are or have been available, Defendant's limited production of a single representation version of each of NBA 2K16, 2K17, 2K18, and 2K19 on a single gaming platform, and Defendant's failure to produce or otherwise give Plaintiff access to representative copies of NBA 2K20 and NBA 2K Mobile, it is unduly burdensome for Plaintiff to review every possible version of each of the NBA 2K GAMES. Plaintiff further objects to this request as overly broad, unduly burdensome, irrelevant and not proportional to the needs of this case as it is not limited in scope to either the NBA players or tattoos at issue in this case.

Without waiving these objections or the General Objections set forth above and to the extent that Plaintiff understands this request, Plaintiff admits that when a user is playing basketball games in X-box One versions of NBA 2K16 (TAKE-TWO_0001145), 2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001148) produced by Defendants during discovery, that the audio that may play includes buzzers. Plaintiff denies that the audio that includes buzzers is always playing when a user is playing basketball games in X-box One versions of NBA 2K16 (TAKE-TWO_0001145), 2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001148) produced by Defendants during discovery, and, except as expressly admitted, denies this request

REQUEST FOR ADMISSION NO. 27:

Admit that the audio that plays during the NBA 2K GAMES' gameplay includes the squeaking of shoes on the court.

RESPONSE:

Plaintiff objects to this request as being vague and ambiguous as the terms "gameplay" and "squeaking of shoes" are not defined and their meaning is not clear from the context. Plaintiff further objects to this request as being overly broad in that it is not proportional to the needs of the case as Defendants are in a better position to understand how each and every version of the accused NBA 2K GAMES operate. Given the number of games at issues the different version of these games that are or have been available, Defendant's limited production of a single representation version of each of NBA 2K16, 2K17, 2K18, and 2K19 on a single gaming platform, Defendant's failure to produce or otherwise give Plaintiff access to representative copies of NBA 2K20 and NBA 2K Mobile, it is unduly burdensome for Plaintiff to review every possible version

of each of the NBA 2K GAMES. Plaintiff further objects to this request as overly broad, unduly burdensome, irrelevant and not proportional to the needs of this case as it is not limited in scope to either the NBA players or tattoos at issue in this case.

Without waiving these objections or the General Objections set forth above and to the extent that Plaintiff understands this request, Plaintiff admits that when a user is playing basketball games in X-box One versions of NBA 2K16 (TAKE-TWO_0001145), 2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001148) produced by Defendants during discovery, that the audio that may play includes squeaking shoes. Plaintiff denies that the audio that includes squeaking shoes is always playing when a user is playing basketball games in X-box One versions of NBA 2K16 (TAKE-TWO_0001145), 2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001148) produced by Defendants during discovery, and, except as expressly admitted, denies this request..

REQUEST FOR ADMISSION NO. 28:

Admit that the audio that plays during the NBA 2K GAMES' gameplay includes whistle sounds from the referees.

RESPONSE:

Plaintiff objects to this request as being vague and ambiguous as the terms "gameplay" and "whistle sounds from the referees" are not defined and their meaning is not clear from the context. Plaintiff further objects to this request as being overly broad in that it is not proportional to the needs of the case as Defendants are in a better position to understand how each and every version of the accused NBA 2K GAMES operate. Given the number of games at issues the different version of these games that are or have been available, Defendant's limited production of a single

representation version of each of NBA 2K16, 2K17, 2K18, and 2K19 on a single gaming platform, Defendant's failure to produce or otherwise give Plaintiff access to representative copies of NBA 2K20 and NBA 2K Mobile, it is unduly burdensome for Plaintiff to review every possible version of each of the NBA 2K GAMES. Plaintiff further objects to this request as overly broad, unduly burdensome, irrelevant and not proportional to the needs of this case as it is not limited in scope to either the NBA players or tattoos at issue in this case.

Without waiving these objections or the General Objections set forth above and to the extent that Plaintiff understands this request, Plaintiff admits that when a user is playing basketball games in X-box One versions of NBA 2K16 (TAKE-TWO_0001145), 2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001148) produced by Defendants during discovery, that the audio that may play includes whistle sounds. Plaintiff denies that the audio that includes whistle sounds is always playing when a user is playing basketball games in X-box One versions of NBA 2K16 (TAKE-TWO_0001145), 2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001148) produced by Defendants during discovery, and, except as expressly admitted, denies this request..

REQUEST FOR ADMISSION NO. 29:

Admit that the audio that plays during the NBA 2K GAMES' gameplay simulates sounds heard in real world professional basketball games.

RESPONSE:

Plaintiff objects to this request as being vague and ambiguous as the term and phrase "gameplay" and "simulates sounds heard in real world professional basketball games" are not defined and their meaning is not clear from the context. Plaintiff further objects to this request as

being overly broad in that it is not proportional to the needs of the case as Defendants are in a better position to understand how each and every version of the accused NBA 2K GAMES operate. Given the number of games at issues the different version of these games that are or have been available, Defendant's limited production of a single representation version of each of NBA 2K16, 2K17, 2K18, and 2K19 on a single gaming platform, Defendant's failure to produce or otherwise give Plaintiff access to representative copies of NBA 2K20 and NBA 2K Mobile, it is unduly burdensome for Plaintiff to review every possible version of each of the NBA 2K GAMES. Plaintiff further objects to this request as overly broad, unduly burdensome, irrelevant and not proportional to the needs of this case as it is not limited in scope to either the NBA players or tattoos at issue in this case.

Without waiving these objections or the General Objections set forth above and to the extent that Plaintiff understands this request, Plaintiff admits that when a user is playing basketball games in X-box One versions of NBA 2K16 (TAKE-TWO_0001145), 2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001148) produced by Defendants during discovery, that the audio that may play includes sounds that might occur during a basketball game. Plaintiff denies that the audio is always playing when a user is playing basketball games in X-box One versions of NBA 2K16 (TAKE-TWO_0001145), 2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001148) produced by Defendants during discovery, and, except as expressly admitted, denies this request..

REQUEST FOR ADMISSION NO. 30:

Admit that the audio that plays during the NBA 2K GAMES' gameplay includes an intermittent musical soundtrack.

RESPONSE:

Plaintiff objects to this request as being vague and ambiguous as the terms “gameplay” and “intermittent musical soundtrack” are not defined and their meaning is not clear from the context. Plaintiff further objects to this request as being overly broad in that it is not proportional to the needs of the case as Defendants are in a better position to understand how each and every version of the accused NBA 2K GAMES operate. Given the number of games at issues the different version of these games that are or have been available, Defendant’s limited production of a single representation version of each of NBA 2K16, 2K17, 2K18, and 2K19 on a single gaming platform, Defendant’s failure to produce or otherwise give Plaintiff access to representative copies of NBA 2K20 and NBA 2K Mobile, it is unduly burdensome for Plaintiff to review every possible version of each of the NBA 2K GAMES. Plaintiff further objects to this request as overly broad, unduly burdensome, irrelevant and not proportional to the needs of this case as it is not limited in scope to either the NBA players or tattoos at issue in this case.

Without waiving these objections or the General Objections set forth above and to the extent that Plaintiff understands this request, Plaintiff admits that when a user is playing basketball games in X-box One versions of NBA 2K16 (TAKE-TWO_0001145), 2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001148) produced by Defendants during discovery, that the audio that may play may include music. Plaintiff denies that the audio that includes music is always playing when a user is playing basketball games in X-box One versions of NBA 2K16 (TAKE-TWO_0001145), 2K17 (TAKE-TWO_0001146), 2K18 (TAKE-TWO_0001147) and 2K19 (TAKE-TWO_0001148) produced by Defendants during discovery, and, except as expressly admitted, Plaintiff denies this request

REQUEST FOR ADMISSION NO. 240:

Admit that YOU are not aware of any tattooist who has licensed tattoos for inclusion in video games.

RESPONSE:

Plaintiff objects to this request as seeking information not relevant to the claims and defenses at issue in this case.

Without waiving this objection the specific and General Objections set forth above, Plaintiff admits this request.

REQUEST FOR ADMISSION NO. 241:

Admit that the NBA 2K GAMES are not substitutes for the ASSERTED WORKS.

RESPONSE:

Plaintiff objects to this request as being vague and ambiguous as the term “substitutes” is not defined and its meaning is not clear from the context. To the extent that Plaintiff understands this request, Plaintiff further objects to this request as seeking information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or both. Plaintiff further objects to this request as seeking an admission of matters outside the scope of Rule 36 and admission of legal conclusions regarding an ultimate issue in the case.

Dated: September 27, 2019

By: /s/ Andrew Alexander

Daniel McMullen (Ohio Bar No. 0034380)
Georgia E. Yanchar (Ohio Bar No. 0071458)
Andrew Alexander (Ohio Bar No. 0091167)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114-1607
Telephone: (216) 622-8200
Facsimile: (216) 241-0816
E-mail: dmcullen@calfee.com
gyanchar@calfee.com
aalexander@calfee.com

Of Counsel

Kimberly A. Pinter (Ohio Bar No. 0084277)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114-1607
Telephone: (216) 622-8200
Facsimile: (216) 241-0816
E-mail: kpinter@calfee.com